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143275—37

# In the Supreme Court of the United States

OCTOBER TERM, 1936

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No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

BRADLEY W. PALMER

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT**

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit, entered in the above entitled cause February 12, 1937.

**OPINIONS BELOW**

The opinion of the Board of Tax Appeals (R. 161–176) is reported in 32 B. T. A. 550. The opinion of the Circuit Court of Appeals (R. 195–204) has not yet been officially reported.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 12, 1937 (R. 204). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

The court below held that where a corporation issues to its stockholders rights to acquire from it shares of stock which it owns in other corporations, at prices substantially less than the fair market value of such shares, and the rights are exercised, there is a taxable dividend to the stockholders. The question presented is as of what date should the stock or rights be valued for the purpose of determining the amount of the dividend.

## STATUTE INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or

the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of dividend.*—The term "dividend" when used in this title (except in section 203 (a) (4) and section 208 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

* * * * *

STATEMENT

On January 1, 1929, the respondent was the owner of 6,396 shares of common stock of the American Superpower Corporation (hereinafter referred to as Superpower), and on June 10, 1929, he acquired four additional shares, making a total of 6,400 shares of Superpower held by respondent on that date. On or about June 11, 1929, the common stock of Superpower was split up five for one and respondent received 32,000 shares of the new common stock for the 6,400 shares originally held by him. (R. 69.)

On January 23, 1929, Superpower was the owner of 2,210,853 shares of common stock of the United Corporation (hereinafter referred to as United), and on that date its board of directors approved a plan for distributing a portion of Superpower's holdings of United stock to its stockholders. By

resolutions then adopted, all its stockholders of record on January 26, 1929, were given the right to acquire from Superpower, United stock at $25 per share and at the rate of one share of United stock for each two shares of Superpower stock (R. 69–70.)

On January 31, 1929, certificates dated February 1, 1929, were mailed by Superpower to all its stockholders of record on January 26, 1929. Respondent, on February 1, 1929, received his certificate which recited that he, as the holder of 6,396 shares of Superpower stock, was entitled to acquire from the corporation 3,198 shares of United stock at a price of $25 per share. On February 15, 1929, respondent paid to Superpower the sum of $79,950 in cash, surrendered the certificate, and received 3,198 shares of United Stock. On January 26, 1929, the number of shares of common stock of Superpower outstanding was 1,642,944 and the number of rights issued was the same. (R. 70–71.)

Starting on January 25, 1929, the above mentioned rights were dealt in on the New York Curb Exchange and ranged from a low of 11⅝ on January 25, to a high of 19⅝ on January 31, and to a low of 12⅜ on February 15. On January 26, the date named in the resolution for determining the stockholders of record entitled to participate in the distribution, they sold on the market for a high of 12⅞ and a low of 12⅛; on February 1, the date the rights were received by respondent, they sold for a high of 18 and a low of 16¼; on February 15, the

date the rights were exercised by respondent they sold for a high of 13¼ and a low of 12⅜. (R. 71.) On January 29, 30, and 31, 1929, Superpower sold to the public substantial blocks of United common at prices ranging from $56.96 to $63.46 per share. (R. 88.)

On May 1, 1929, similar action was taken by the directors of Superpower with respect of further holdings of United common stock, its stockholders of record on May 8, 1929 being given the right to acquire United stock at $30 per share and at the rate of one share of United for each four shares of Superpower stock. On May 13, 1929, respondent received from Superpower a certificate which recited that he, as the owner of 6,396 shares of Superpower common stock, was entitled to acquire from the corporation 1,599 shares of United stock at a price of $30 per share. On May 24, 1929, respondent paid to Superpower the sum of $47,970 in cash, surrendered the certificate and received 1,599 shares of United stock. On May 8, 1929, the number of shares of Superpower outstanding was 1,643,216, and the number of rights issued was 1,643,216. (R. 72–73.)

Starting on May 2, 1929, the aforementioned rights were dealt in on the New York Curb Exchange and ranged from a low of 6⅛ on May 2nd to a high of 11⅜ on May 11th. (R. 73–74.)

Prior to June 18, 1929, Superpower acquired certain shares of common stock of the Common-

wealth and Southern Corporation. On June 5, 1929, Superpower's board of directors adopted certain resolutions pursuant to which its common stockholders of record on June 18, 1929, were given the right to acquire from the corporation one share of Commonwealth and Southern Corporation stock for each ten shares of Superpower stock. (R. 74, 32–33.) On June 23, 1929, respondent received a certificate which recited that he, as the holder of 32,000 shares of Superpower stock was entitled to acquire from the corporation 3,200 shares of Commonwealth and Southern Corporation stock at a price of $15 per share. On July 2, 1929, respondent paid to Superpower the sum of $48,000 in cash, surrendered the certificate, and received from the corporation 3,200 shares of Commonwealth and Southern Corporation stock. On June 18, 1929, the number of shares of common stock of Superpower outstanding was 8,242,310 and the number of rights issued was 8,242,310. (R. 75–76.)

Starting on June 6, 1929, these rights were dealt in on the New York Curb Exchange and ranged from a low of $\frac{9}{16}$ to a high of $1\frac{15}{16}$. (R. 76.)

The Commissioner of Internal Revenue determined that the respondent was in receipt of taxable dividends as a result of the foregoing transactions and determined the amount of the dividend by valuing the rights as of the dates named in the corporate resolutions for determining the stockholders of record entitled to receive

the rights. Before the Board of Tax Appeals the Commisioner asked that the deficiency be increased should the Board find that in determining the amount of the dividend the stock or rights should be valued as of some other date. (R. 63.) The Board of Tax Appeals held that the respondent was not in receipt of taxable dividends as a result of the above mentioned transaction and therefore found it unnecessary to pass upon the question.

In petitioning for review before the Circuit Court of Appeals, the Commissioner assigned as error, *inter alia*, the failure of the Board to hold that taxable dividends had been received equal to the market value of the rights when receivable by respondent (R. 189, par. 7) or when received by respondent (R. 190, pars. 8, 9). The Circuit Court of Appeals reversed the judgment of the Board, holding that taxable dividends had been received, but that their amount should be determined by the value of the stock as of the date the rights were exercised (R. 200).

## SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that, for the purpose of determining the amount of the dividend, the stock or rights should be valued as of the date the rights were exercised.

2. In failing to hold that, for the purpose of determining the amount of the dividend, the stock or

rights should be valued as of the date the rights were received by the taxpayer.

3. In the alternative, in failing to hold that, for the purpose of determining the amount of the dividend, the stock or rights should be valued as of the record dates or the dates when the rights were receivable by the taxpayer.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals, holding that the amount of the dividend should be determined by valuing the stock or rights as of the date the rights were exercised, is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Ramapo, Inc.* v. *Commissioner,* 84 F. (2d) 986. That case involved the same rights as are under consideration here, and the court, citing the decision of this Court in *Avery* v. *Commissioner,* 292 U. S. 210, held that the rights should be valued as of the dates the certificates or warrants were received by the taxpayer. That court likewise held that the several distributions of rights represented dividends in the hands of the taxpayer, and on that issue the decision is in harmony with the decision of the court below in the instant case.

2. The taxpayer has heretofore filed a petition for certiorari which is now pending before this Court under the title of *Palmer* v. *Helvering,* No. 848, present term. That petition seeks review of the question whether taxable dividends were re-

ceived. While there is no conflict on that question, we filed a memorandum not opposing the granting of the writ, because of the importance of the question and the appropriateness of passing upon the whole case in view of the Commissioner's intention to file the present petition. Likewise, we did not oppose the taxpayer's petition in *Mayer* v. *Helvering,* now pending, No. 862, present term, where the same stock rights are involved. If certiorari is granted in those two cases it should, we submit, be granted here, so that the Court may pass upon the question in its entirety.

## CONCLUSION

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
*Solicitor General.*

MAY 1937.

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